U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

JOHNNY GARCIA, **ARB CASE NO. 98-162**

COMPLAINANT, **ALJ CASE NO. 98-STA-23**

v. **DATE: December 3, 1998**

AAA COOPER TRANSPORTATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Joe Ramon,
League of United Latin American Citizens, Houston, Texas

For the Respondent:
Kurt A. Powell, Esq., Bradley E. Heard, Esq.,
Hunton & Williams, Atlanta, Georgia

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. §31105 (1994).[1/] Before us for review is the Recommended Decision and Order (R. D. & O.) issued by the Administrative Law Judge (ALJ) assigned to the case. The complainant, Johnny Garcia (Garcia), alleged that he was suspended without pay by his employer, AAA Cooper Transportation (AAA Cooper), for engaging in protected activity, and that the suspension constituted a violation of STAA. After a hearing on the merits, the ALJ determined that Garcia had failed to establish a STAA violation and dismissed the complaint.

[1/] The ALJ mistakenly quoted the employee protection provision of STAA as it was codified at 49 U.S.C. app. §2305. In 1994 the provision was amended and recodified as §31105. The ALJ also mistakenly cited the STAA provision as 49 U.S.C. §31104 rather than §31105. Recommended Decision and Order at 1, 5.

The ALJ's findings of fact are supported by substantial evidence in the record; thus we accept them as conclusive. R. D. & O. at 2-6; 29 C.F.R. §1978.109(c)(3)(1997). Except as expressly modified or clarified below, we also accept the ALJ's conclusions of law and dismiss Garcia's complaint. 29 C.F.R. §1978.109(c)(4)(1997).

BACKGROUND

I. Procedural History

On or about April 6, 1998, Garcia filed a STAA complaint with the Occupational Safety and Health Administration (OSHA). OSHA investigated the complaint, and on April 29, 1998, concluded that there was no cause to believe that the complaint had merit.[2/] R. D. & O. at 2. By letter dated June 3, 1998, Garcia requested a formal hearing before a Department of Labor ALJ. *Id*. The matter was tried on July 17, 1998, in Houston, Texas, and the ALJ issued his recommended decision on August 26, 1998. *Id*.

This Board issued a Notice of Review on September 2, 1998. Each of the parties filed briefs with the Board.[3/]

II. Facts

In March 1987, Johnny Garcia was hired by AAA Cooper, an interstate trucking business with offices in Houston, Texas.[4/] Garcia was employed as a commercial driver delivering freight.[5/] R. D. & O. at 2. On April 3, 1998, Garcia was dispatched to make a delivery to Process Solutions International (P.S.I.), a customer with offices located within the city limits of Houston. *Id*. at 2-3. When Garcia arrived at P.S.I. and attempted to back the tractor-trailer into the customer's driveway, he "almost got stuck in a ditch." Tr. at 12. After his failed attempt to get in the driveway, Garcia notified his dispatcher at the AAA Cooper offices that he had a problem. R. D. & O. at 3.

The dispatcher told Garcia to park the truck in the street and unload it from there. Tr. at 13. Garcia said he could not unload from the street because it was posted with "no parking" signs. *Id*. The dispatcher advised Garcia that he nevertheless should unload from the street, and if he was given a ticket, the company would pay for it. R. D. & O. at 3. Garcia responded that he still could not

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[2/] The ALJ noted the date of OSHA's Findings as April 19, 1998; the correct date is April 29, 1998. R. D. & O. at 2; ALJ Exhibit (ALJX) 1.

[3/] AAA Cooper moved this Board to strike Garcia's brief as untimely filed. We deny the motion and have considered the brief.

[4/] Garcia was hired by AAA Cooper in 1987, not in 1997 as noted by the ALJ. R. D. & O. at 2; Transcript (Tr.) at 11; Respondent's Brief in Support of the ALJ's Recommended Decision (Resp. Br.) at 2.

[5/] As of September 24, 1998, Garcia was still employed by Respondent. Resp. Br. at 2.

park on the street to unload because it was a "dangerous street." Tr. at 13. In Garcia's view, the street was too narrow to permit the tractor/trailer to be parked there while unloading, and he was fearful that either he or someone else would get hit "while we're unloading the merchandise out here in the middle of the street." *Id*. At the dispatcher's instruction, Garcia brought the load back to the terminal. R. D. & O. at 3. On his way back, Garcia radioed the dispatcher that he was not "refusing to make this delivery," and that he would be willing to do so with a smaller trailer. *Id*.

Upon his return to the terminal, Garcia dropped the trailer and was dispatched on another delivery. Mark Dixon, a company driver familiar with the customer's location, picked up the trailer Garcia had used and successfully made the delivery to P.S.I. *Id*.; Tr. at 14. At the end of the work day, Robert McMillan, Respondent's terminal manager, asked to speak to Garcia. Tr. at 17.

McMillan asked why Garcia had failed to make the delivery and Garcia again mentioned the "no parking" signs as well as his belief that delivery from the truck on the side of the road would have been unsafe. Tr. at 115. McMillan told Garcia that he had accompanied Dixon to P.S.I. earlier in the day for the express purpose of determining whether delivery to that location could be made safely. McMillan observed that the street was straight with good visibility, the road traffic was light, and when the tractor/trailer was parked on the side of the road, there was plenty of room for traffic to pass. R. D. & O. at 4; Respondent's Exhibit (RX) 5. With the truck parked along the street, Dixon had unloaded the freight without incident. R. D. & O. at 4.

McMillan considered the matter over the weekend and on the next workday informed Garcia that his refusal to make the delivery to P.S.I. was unreasonable and a violation of company policy. Tr. at 17-18; RX 11. Accordingly, Garcia was suspended for three days without pay. *Id*.

DISCUSSION

The issue upon which this case turns is whether Garcia engaged in activity protected by STAA when he refused to unload the tractor/trailer. As we discuss below, we agree with the ALJ that Garcia did not and dismiss the case.

The employee protection provisions of STAA provide in relevant part:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because --
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> * * * *
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> (B) the employee refuses to operate a vehicle because --
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> * * * *
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> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §31105 (1994).

To prevail on a STAA complaint, a complainant must establish that he engaged in protected activity, that he was subject to adverse employment action, and that his employer was aware of his protected activity when it took the adverse action. *Self* v. *Carolina Freight Carriers Corporation*, Case No. 89-STA-9, Final Decision and Ord., Jan. 12, 1990, slip op. at 3.

Garcia claimed that his refusal to make the delivery to P.S.I. was protected activity under STAA because it was based on his reasonable apprehension that such a roadside delivery was dangerous. A "refusal" to drive, or in this case to park and unload, is protected under STAA if a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury.[6/] *See Byrd* v. *Consolidated Motor Freight*, Case No. 97-STA-9, Final Decision and Ord., May 5, 1998, slip op. at 8, appeal docketed, No. 98-9197 (11th Cir. Sept. 21, 1998). STAA defines reasonable apprehension as follows:

> [A]n employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health . . . .

49 U.S.C. §31105(a)(2) (1994).

Violations of the reasonable apprehension clause involve more than engine defects, failed brakes, and other problems with the mechanical parts of a motor vehicle; the clause is intended "to assure that employees are not forced to . . . commit unsafe acts." *Bryant* v. *Bob Evans Transportation*, Case No. 94-STA-24, Sec. Dec. and Ord., Apr. 10, 1995, slip op. at 7; 128 Cong. Rec. 29190, 29192 (1982).[7/] The Secretary has construed the reasonable apprehension provision to apply to conditions which make the operation of the vehicle a safety hazard. *Bryant* v. *Bob Evans Transportation*, *supra*, slip op. at 7 (refusal to drive with a dangerous driver); *Palmer* v. *Western Truck Manpower, Inc*., Case No.85-STA-6, Sec. Dec. and Ord. on Remand, Jan. 16, 1987, slip op. at 4 (refusal to drive improperly loaded trailer);[8/] *Robinson* v. *Duff Trucking Line, Inc*., Case No. 86-

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[6/] Garcia alternatively argued that his refusal to make the delivery was protected activity because parking on the street would violate the city parking ordinance. An activity can be protected under STAA if it is shown that the operation would have "violated a regulation, standard, or order of the *United States* related to commercial motor vehicle safety or health." 49 U.S.C. §31105(a)(1)(B)(i) (1994) (emphasis added). Refusal to engage in activity which may violate only a city parking ordinance is not protected under STAA.

[7/] Section-by-Section Analysis: Title IV - Commercial Motor Vehicle Safety, S. 3044, "Surface Transportation Act of 1982," Section 409.

[8/] *Remanded on other grounds*, *Western Truck Manpower, Inc.* v. *United States Dept. of Labor,* 943 F.2d 56 (1991); Sec. Dec. & Ord. on Remand (Mar. 13, 1992), *aff'd Western Truck Manpower,* (continued...)

STA-3, Sec. Dec. and Ord., Mar. 6, 1987, slip op. at 8-9, *aff'd Duff Trucking Line, Inc.* v. *Brock*, 848 F.2d 189 (6th Cir. 1988) (refusal to drive because of weather conditions). Refusal to unload a truck from the roadside would constitute protected activity if the refusing driver has a reasonable apprehension of serious injury.

The only evidence Garcia presented to support the reasonableness of his concern was his own testimony that the road was dangerous.[9/] Garcia argued that parking the tractor/trailer on the side of the road while unloading would be dangerous because the street was narrow. His concern was that either he or others could be hurt by oncoming traffic as they moved the material from the truck. We must assess, therefore, the reasonableness of Garcia's concern in light of the evidence produced by Respondent.

First, the objective reasonableness of an employee's perception that an unsafe condition existed must be evaluated in the light of the situation that had confronted the employee at the time. *Yellow Freight Systems, Inc.* v. *Reich and Thom*, 38 F. 3d 76, 82 (2d Cir. 1994). In the present case, AAA Cooper evaluated essentially the same situation which confronted Garcia. Terminal manager McMillan accompanied Dixon (the replacement driver) to P.S.I. on the afternoon of April 3, 1998, after Garcia refused to make the delivery. Thus, McMillan was able to assess the potential hazards the delivery presented on the same day and with the same trailer used by Garcia. McMillan and Dixon each testified that the delivery could be made safely. R. D. & O. at 4.

Furthermore, AAA Cooper produced evidence from two P.S.I. employees who reported that deliveries to their site were made daily from trucks parked on the street; in fact, while Dixon was making the delivery on April 3, 1998, a UPS truck was also making a similar delivery from his truck parked roadside. RX 3, 10; Tr. at 104-108. Finally, the evidence showed that other AAA Cooper drivers routinely made deliveries to P.S.I. by unloading from the truck parked in the street; none of these drivers had reported any problems or any safety concerns. Tr. at 109; RX 4.

These facts constitute substantial evidence to support the ALJ's decision that Garcia failed to prove that his safety concerns were reasonable. R. D. & O. at 6. Refusal to work because of an

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[8/](...continued)
Inc. v. *United States Dept. of Labor*, 12 F.3d 151 (9th Cir. 1993).

[9/] On cross examination, Garcia acknowledged that the road in front of P.S.I. was straight, that other AAA Cooper drivers routinely delivered there, and that during his attempted delivery, he had seen other trucks parked on the street making similar deliveries to other locations. R. D. & O. at 3.

unreasonable apprehension or concern about safety is not protected activity under STAA.[10/] *Castle Coal & Oil Co., Inc.* v. *Reich,* 55 F. 3d 41, 45 (2d Cir. 1995).

In sum, Garcia's apprehension regarding the required delivery was not reasonable, and thus his refusal is not protected under Surface Transportation Assistance Act. Accordingly, the complaint is dismissed.

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Acting Member

[10/] Although the ALJ concluded that Garcia's refusal to make the delivery was unreasonable, he made no express finding as to whether the refusal constituted protected activity. R. D. & O. at 6. Moreover, the ALJ explicitly found that "Mr. Garcia was suspended *because* he was unwilling to make a delivery as instructed." R. D. & O. at 6 (emphasis added). In spite of this finding, however, the ALJ inexplicably concluded that "Complainant has not demonstrated a *causal link* between his protected activity, if any, and the adverse action taken against him by Respondent." R. D. & O. at 6-7 (emphasis added).